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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 143.

JOHN JAROSZEWSKI,

Petitioner,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

BRIEF FOR RESPONDENT IN OPPOSITION.

ANTHONY T. AUGELLI,
Attorney for Respondent,
One Exchange Place,
Jersey City 2, New Jersey.

WILLIAM F. HANLON,
of Counsel,
Room 38, Jersey Terminal,
C. R. R. of N. J.

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Opinion Below.

The opinion of the Supreme Court of New Jersey (Pb1a; also printed as an Appendix to Petitioner's Brief) is reported at 9 N. J. 231.

Jurisdiction.

The jurisdiction of this Court is correctly designated in the Petition.

Questions Presented.

I. Whether the evidence upon the trial of this action was sufficient to support a jury verdict for the Petitioner.

II. Whether any important question of Federal Law is here presented.

III. Whether the decision below is in conflict with any other decision of this or any lower Federal Court.

Statute Involved.

The Federal Employers Liability Act (April 22, 1908), 35 Stat. 65, c. 140, as amended (45 U. S. C. A. Sec. 51, et seq.).

Statement.

The Statement set forth in the Brief in Support of the Petition is substantially correct. Respondent desires to add that petitioner, himself, testified (R108a) that it was his duty to inspect railroad cars for his employer (the respondent), for the purpose of locating defects and ascertaining what was wrong; it being within his discretion to determine whether the existence of any defect required the removal of a car from service for repairs (R111a). Petitioner's experience as a car inspector and repairman had extended over a period of 17½ years, covering his employment with respondent and with other railroads (R106a).

The injury for which petitioner sought damages occurred at 6:00 p. m. on July 29, 1948, in daylight. The car was a "brand new" box car (R91a). Petitioner found it standing empty in respondent's yard, with its door open

(R90-91a). He had looked inside, and inspected the door, its handle and hasp, and the bottom rail upon which it moved. Without looking at the top rail of the door, petitioner undertook to close it, and succeeded in completing all but six or seven inches of complete closing when the door stopped, and would move no further. At that point, he looked again at the bottom rail, and while doing so, the door fell on him (R92-94a). The fall of the door was caused by the "bent up" condition of the upper guide rail on which it moved. The condition of this upper rail was obvious and apparent to anyone who might look at it (R137, 154, 156a). The upper door rail had been damaged by the steel cable of a crane used in unloading the cargo of heavy copper billets with which the car had been loaded (R137, 147, 148a). The unloading had been performed at Perth Amboy, between July 25 and 27, 1948, but not while in the possession of nor by the respondent or its employees (R134, 135, 153a). The car had been inspected, on the day before delivery to unloading point, by respondent's inspector (Hurley), and found in good order (R160a). The inspection, in which petitioner was engaged when he was injured, was the first which respondent had made after resumption of possession of the car following its unloading by other agencies (R133a). The car did not belong to respondent, but was the property of another railroad (The St. Louis & San Francisco) (R133, 145a). Petitioner had inspected railroad box cars and ordered them "shopped" (withdrawn from service for repairs) for defects in their door equipment, including bent upper and lower door rails, on November 24 and 30, 1946, January 9, April 16, 29 and 30, June 3 and 11, and July 7, 10 and 17, 1948 (R132a).

Petitioner returned to work 16 days after his accident; lost wages totalling $179.62, and incurred medical expense of approximately $24.00 (R118, 138a). He returned to

work August 15, 1948, and had worked continuously every scheduled working day, including some "doubles", except for four days, up to the date of trial (R139-141a).

ARGUMENT.

I.

The decision below is clearly correct.

The Statute (35 Stat. 65, c. 149, as amended) imposed upon respondent liability in damages to petitioner only for injury resulting from the negligence of any officer, agent or employee of respondent, or by reason of any defect or insufficiency, due to respondent's negligence, in its cars.

> 45 U. S. C. A. § 51;
> *Wilkerson* v. *McCarthy*, 336 U. S. 53.

Respondent was not an insurer of petitioner's safety. As was pointed out by Mr. Justice Frankfurter in his joinder in the dissenting opinion of Mr. Justice Roberts in *Bailey* v. *Central Vermont Railway, Inc.*, 319 U. S. 350 (at p. 358) this Court should not strain the law of negligence to accord workmen's compensation, where the employer is without fault.

Petitioner had the burden of proving both negligence on the part of respondent and a causal relationship between such negligence, if any, and petitioner's injuries.

> *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67;
> *Brady* v. *Southern R. Co.*, 320 U. S. 476, 484;
> *Tennant* v. *Peoria & Pekin Union Rwy. Co.*, 321 U. S. 29;

Ellis v. *Union Pacific R. Co.*, 329 U. S. 649, 653;
Eckenrode v. *Pennsylvania R. Co.*, 335 U. S. 329;
Barry v. *Reading Co.*, 147 Fed. 2d 129; cert. den. 324 U. S. 867.

If the sole cause of his injuries was petitioner's own carelessness, such fact would preclude a finding of causal negligence on the part of respondent, but would not constitute or be equivalent to a finding of contributory negligence. The sole ground upon which the respondent based its motion to the trial court to dismiss the complaint (made after all of the evidence had been presented) was the claimed insufficiency of the evidence to establish negligence on the part of the defendant (respondent here). No contention was urged either that the plaintiff (petitioner here) was contributorily negligent or that he assumed the risk (R163a).

The particular aspect of charged negligence upon which petitioner relied at the trial was failure to make reasonable inspection of the car (R11, 166a). The trial court apparently recognized (R169a) that the sole duty of inspection to locate defects rested upon the petitioner; but the trial court was also apparently under the impression that, because the car door did not fall until he had pushed it almost to a closed position, his inspectorial function was limited to the ascertainment of whether the car doors were closed and his duty to the closing of them. Such impression fails to find support in the evidence. The testimony, including that of petitioner, conclusively indicated that the closing of car doors which were open was but one of the steps which petitioner was required to take in discharging his duty as car inspector.

The (appellate) court below decided that there was no reasonable basis in the evidence upon which a jury could

find against respondent (Pb5a). The reviewing court therefore held that the preliminary question of law—*i.e.*, whether there was any competent evidence to go to the jury upon the liability issue—should have been decided in respondent's favor, and, accordingly reversed and entered judgment for respondent.

Petitioner's contention here that the New Jersey Supreme Court, in reversing the judgment of the trial court, "impliedly" or "inferentially" determined that petitioner was guilty of contributory negligence or assumption of risk, is utterly unwarranted and completely contradicted by the language of that court's opinion, reading, in part, as follows (Pb4a):

> "Plaintiff's own theory is that the damage to the door rail occurred in the act of unloading and that there was a failure (fol. 188) to inspect after the unloading even though he was injured in doing that very thing at Jersey City. It cannot be said that in such circumstances there was a failure of duty in this regard when it was the very performance of that duty which caused plaintiff's injuries."

Nor does this case, under the evidence, fall within the doctrine *res ipsa loquitur*. Essential prerequisites to the application of that doctrine are absent. First, the happening does not of itself speak of respondent's negligence. It could have resulted, with equal probability, from a number of causes, with which respondent was unconnected. In fact, the proof stands uncontradicted that the cause of the fall of the car door was its movement in petitioner's efforts to close it, upon which was superimposed the distortion of the upper door rail by the pressure, pull and movement of steel cables, used by an agency with which respondent was unconnected, in the unloading of the cargo of copper billets at Perth Amboy while the car was out of respond-

ent's possession. In the second place, the proofs are barren of any basis for inference that respondent had had any opportunity, other than the occasion of petitioner's inspection, or any means, other than the petitioner himself, to make the very inspection which petitioner charges respondent with the duty of making. Finally, although the car was in respondent's yard when petitioner undertook to inspect it, the offending car door and its appurtenances, if in respondent's imputed possession, were in the actual possession and under the exclusive physical control of petitioner. The door did not fall while en route from Perth Amboy to Jersey City, nor until petitioner had forced it almost to a closed position.

San Juan Light & Transit Co. v. *Requena*, 224 U. S. 89, 98.

See also *Broecker* v. *Armstrong Cork Co.* (E. & A., N.J., 1941), 128 N. J. L. 3, stating the rule (at p. 8) that "where all the facts and circumstances under which the accident occurred are disclosed by the evidence • • • there is nothing left to inference, and the rule of *res ipsa loquitur* does not apply."

The decision of the New Jersey Supreme Court, in reversing petitioner's judgment in the trial court, entered upon a jury verdict there, does not infringe upon petitioner's Constitutional right of trial by jury. In the language of Mr. Justice Frankfurter, in his concurring opinion in *Wilkerson* v. *McCarthy*, 336 U. S. 53, 64, is found the statement that the Constitutional guarantee of trial by jury presupposes a jury under the proper guidance of a disinterested and competent trial judge (*Herron* v. *Southern Pacific Co.*, 283 U. S. 91), and it is an important element of trial by jury which puts upon the judge the exacting duty of determining whether there is solid evidence on which a jury's verdict could be fairly based. In *Wilkerson* v.

McCarthy, supra, at page 75, Mr. Justice Jackson, dissenting, rejects the doctrine "that any time a trial or appellate court weighs evidence or examines facts it is usurping the jury's function"; adding that " under that rule every claim of injury would require a jury trial, even if the evidence showed no possible basis for a finding of negligence. The determination of whether there could be such a basis is a function of the trial court, even though it involves weighing evidence and examining facts."

In suits under the Statute, a scintilla of evidence is insufficient to make a jury question.

Baltimore & Ohio R. Co. v. *Groeger,* 266 U. S. 521, 524. It is the duty of a trial judge to direct a verdict for defendant, when the testimony, and all inferences deductible therefrom is insufficient to support a verdict for plaintiff.

Toledo, St. Louis & Western R. Co. v. *Allen,* 276 U. S. 165, 168.

In the case at bar, petitioner had his trial by jury. The trial judge, upon the motion to dismiss, held that a jury question was presented by the evidence. The New Jersey Supreme Court held *contra.* Now petitioner seeks another review of the evidence by this Court. Petitioner's right of trial by jury was not affected by the decision below.

II.

No important question of Federal Law is here presented.

The court below (as did also the trial court) recognized that the cause of action rested upon the Federal Employers Liability Act (45 U. S. C. A. §51, *et seq.*), and that it sounded in negligence (Pb2a). The opinion below cited and con-

sidered the controlling effect of decisions of this Court, viz.: *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, and *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329. It undertook to distinguish *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, which was relied upon by petitioner below and here. The sole question presented to and decided by the court below was the same as is or may be presented in every negligence case tried to a jury, i.e., whether the evidence, viewed in a light most favorable to the plaintiff, makes out a *prima facie* case or presents a reasonable basis for inferring defendant's liability. If that question must be answered in the negative, no factual issue persists for the jury's resolution.

> *Brady* v. *Southern Ry. Co.*, 320 U. S. 476;
> *Scocozza* v. *Erie R. Co.* (C. A. N. Y., 1948), 171 Fed. 2d 745; cert. den. 337 U. S. 907.

Unless an important question of Federal law is presented, a petition for a writ of certiorari to review a decision of a State's highest Court upon a purely common law question accomplishes an unwarranted imposition upon the jurisdiction of this Court. The language of Mr. Justice Frankfurter, in his dissenting opinion in *Wilkerson* v. *McCarthy*, 336 U. S. 53, succinctly, but comprehensively, sets forth what we believe to be the Court's general attitude toward petitions for certiorari in cases of this kind. At page 66 of the report, we read:

> "Considering the volume and complexity of the cases which obviously call for decision by this Court, and considering the time and thought that the proper disposition of such cases demands, I do not think we should take cases merely to review facts already canvassed by two and sometimes three courts, even though those facts may have been erroneously

> appraised. • • • For this Court to take a case which turns merely on such an appraisal of evidence, however much hardship in the fallible application of an archaic system of compensation for injuries to railroad employees may touch our private sympathy, is to deny due regard to the considerations which led the Court to ask and Congress to give the power to control the Court's docket. Such power carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the operation of our federal system; importance of the outcome merely to the parties is not enough. It has been our practice to dismiss a writ of certiorari even after it was granted, where argument exposed a want of conflict or revealed that the case involved no more than its particular facts."

See also *Reynolds* v. *Atlantic Coast Line R. Co.*, 336 U. S. 207, and *Hill* v. *Atlantic Coast Line R. Co.*, 336 U. S. 911. Also, the expression of the similar views, upon this phase of the matter, of Mr. Justice Roberts in *Bailey* v. *Central Vermont Ry. Inc.*, 319 U. S. 350, at pages 354 and 357.

The judicial language above quoted and referred to is peculiarly opposite to the case at bar, which involves "no more than its particular facts" and the outcome of which is important merely to the parties.

III.

The decision below is not in conflict with any other decision of this or any lower Federal Court.

In determining whether a writ of certiorari should be granted, the existence of a conflict between decisions of a Court of Appeals or of this Court and that of the Court here submitted for review, may be relevant. Petitioner asserts (Pb15) that the facts in *Pitcairn* v. *Perry*, 122 F.

2d 881 (C. A. 8, 1941), cert. den. 314 U. S. 697, were identical with those of the case at bar. The implication follows that the decision of the New Jersey Supreme Court here presented for review is in conflict with that in the *Pitcairn* case. Respondent submits that the two cases are factually distinguishable. In both cases the injured plaintiff was a car inspector injured during the course of his employment by the defendant, under circumstances which appropriately invoked the provisions of the Federal Employers Liability Act. Likewise in both cases, the injuries were inflicted by the fall of the side door of a railroad freight box car during efforts to close the door. With the foregoing, the factual similarity between the cases ceases. The plaintiff in the *Pitcairn* case was engaged in the making of a relatively cursory inspection of the car while it formed one of a train of cars in transit at a stop intermediate between terminal stations. The inspection in the case at bar was being made by the petitioner as the servant and agent of the respondent for the purpose of ascertaining what, if any, defects existed in the car for the purpose of "shopping" the car if the defects were of such a character as to require or render desirable its removal from use and confinement to the railroad shop for the making of repairs. It was the duty of the petitioner to search for and locate any defects in the car and to assign the car to the repair shop if, in petitioner's opinion, its condition so required. In the *Pitcairn* case, the train had stopped at an intermediate point several miles away from where the accident occurred and it was then found that the door of one of the freight cars was open. The train crew then and there attempted to close the door but were unsuccessful, thus bringing home to the railroad notice of a defect in its condition or of the likelihood or possibility thereof. The train thereafter proceeded, and, when it arrived in the

yard where the door fell on the plaintiff, he and three fellow employees renewed efforts to close the door; ultimately requiring the application of a crow bar and the use of a hammer in the process. Finally, while plaintiff stood at the middle of the door and pried upon it with a crow bar and others were tapping on the upper door rail with a hammer, pushing on the rear end of the door and pulling on the door handle, it moved four or five inches forward and then fell upon the plaintiff. The Court of Appeals, in reversing the trial court, held that the doctrine *res ipsa loquitur* applied because it appeared that the offending instrumentality was in the control of the defendant and that the accident was such as would not usually have occurred had the railroad availed itself of the opportunity and facilities for the ascertainment of the defect, the removal of the car from service and the making of appropriate repairs. The Appellate Court expressly pointed out that the evidence failed to show that the plaintiff was under any duty to inspect the top of the door, and, moreover, did show that the door and its appurtenances were not in the exclusive control of the plaintiff at the time the accident occurred.

The case at bar is clearly distinguishable from the *Pitcairn* case (*supra*). Admitting that it was respondent's duty to inspect the car and to remove it from service for repairs if its condition so dictated, it was the petitioner, as the *alter ego* of the respondent, who was the sole means by which the respondent was placed on notice of the car's condition and of discharging the duty of inspection in its behalf. In the *Pitcairn* case, notice of the open door and the difficulty in closing it was obtained by the railroad through the members of its train crew when it stopped at the intermediate point en route to its terminal, at which the door was found open and attempts to close it proved

unsuccessful. Moreover, in the efforts which the plaintiff in the *Pitcairn* case was making to close the door at the point at which the car came to rest, other fellow-employees (also agents and servants of the railroad) were participating, thereby, as the railroad's representatives, sharing control of the offending instrumentality. The present petitioner not only was charged with the duty, as respondent's representative, of inspecting the car for the purpose of ascertaining what, if any, defects it might disclose, was also in exclusive possession and control of the door and its appurtenances. His duty to close the door was only an incident of his duty to inspect the condition of the entire car, including that of the door and its appurtenances. The cause of the fall of the door in the case at bar was not undisclosed. The evidence showed that it fell because the upper rail upon which it moved had been bent up by a steel cable or cables used in unloading operations conducted by an agency other than the respondent and out of respondent's possession and control. The condition of the upper door rail was obvious and apparent to a cursory inspection. Petitioner was performing his work of inspecting the car in broad daylight. This aspect of the facts is not referred to as a basis for support of a plea of contributory negligence or assumption of risk, but it is evidence (and such was uncontradicted) that the sole causal negligence in the case, if any, was that of the petitioner and not that of the respondent.

There were present in the *Pitcairn* case (*supra*) the necessary elements to justify the application of the doctrine *res ipsa loquitur*, viz.: (1) absence of fault of the injured person; (2) exclusiveness of control of the offending instrumentality in the defendant; and (3) an injury such as in the ordinary course of things does not occur if the one having control uses proper care.

San Juan Light & Transit Co. v. *Requena*, 224 U. S. 89, 98-99.

In the case at bar, the offending door and its appurtenances were under the exclusive control of the petitioner, and the evidence fails to support an inference that the injury complained of was without fault of the injured person. The doctrine *res ipsa loquitur* is inapplicable to the case at bar because the damaged condition of the upper door rail, which was responsible for the fall of the car door, was the result of the intervention of an agency other than that of the respondent and over which the respondent had no control. Moreover, the evidence was uncontradicted that when the laden car had been first received by the respondent, and again before it was turned over to the consignee for unloading, the condition of the door and its appurtenances was in all respects safe and proper. The continuance of care by the respondent in the form of a subsequent inspection was being discharged by the petitioner as respondent's agent at the time of the accident. There was no showing that possession and control or opportunity to inspect had resided in or been accorded to the respondent between the time of its last previous inspection and the inspection which was in progress by the petitioner when the injuries were inflicted. The car had last stopped in Perth Amboy where it had been unloaded (R. 158a). It had previously been inspected by Messrs. Hurley and Ivorson at Elizabethport and found in good order (R. 135 and 160a). The car arrived in Jersey City at 11:40 p. m. on July 27, 1948, and was inspected by the petitioner on July 29, at 6:00 p. m. The evidence is silent upon the question when petitioner received his orders to inspect the car and also upon the further question whether any earlier inspection by any other inspector could have been made. There

is nothing in the evidence from which it may be inferred that if the inspection had been made earlier or by another inspector, the door would not have fallen and injured him as it did the petitioner.

An examination of the other cases cited and relied upon by the petitioner will indicate that they are factually distinguishable from the case at bar. In each of them there was evidence which either directly disclosed or served as a reasonable basis for inference of negligence on the part of the employer proximately causal to the injuries or death of the employee. Being factually distinguishable from the case at bar, such cited decisions are not in conflict with the decision below. The authorities relied upon by the petitioner neither warrant nor impel the granting of the writ here sought.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

ANTHONY T. AUGELLI,
Counsel for Respondent.

WILLIAM F. HANLON,
of Counsel.

July 21, 1952.